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Supreme Court, U.S.
FILED
071418 MAY 8 - 2008
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

EDWARD SANCHEZ

Petitioner,

v.

CYNTHIA SANCHEZ

Respondent.

AND
IN THE INTEREST OF MINOR CHILDREN
E.N.S., D.A.S, H.M.S., M.E.S.

On Petition for a Writ of Certiorari to the
Texas Fourth Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Troxel* v. *Granville*, 530 U.S. 57 (2000), this Court recognized that the Due Process Clause of the Fourteenth Amendment protects the fundamental rights of parents. Justice Thomas further added that strict scrutiny needs to be applied to infringements of these types of fundamental rights.

1. What measures of procedural due process is a parent entitled to when such fundamental rights are implicated?

2. Whether a state court of appeals review of a divorce-custody case that:

   A. Refused to properly address a challenge that the trial courts findings are in conflict with the plain letter of the law.

   B. Improperly reviewed the legal sufficiency of the evidence by arbitrarily disregarding all controverting evidence, in conflict with its state supreme court directives for legal sufficiency reviews.

   sufficiently violates the due process and/or equal protection clauses of the Fourteenth Amendment.

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required by law. The government has no compelling interest in not affording the process in question.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The memorandum opinion of the Texas Fourth Court of Appeals appears at Appendix A. It has not been published in the SW Reporters Record.

Applicable excerpts of the judgment (divorce decree) of the Guadalupe County Court at Law #2 appears at Appendix B and is unreported.

JURISDICTION

A denial of a timely filed motion for rehearing on petition for review by the Texas Supreme Court was entered on February 8, 2008. This Courts jurisdiction is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The fundamental liberty interest of parents in the care and custody of their children.

The Fourteenth Amendment to the United States Constitution which provides, in pertinent part, that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Texas Family Code, Texas Rules of Appellate Procedure, and Texas case law

STATEMENT

A. Trial Court Proceedings

Temporary Orders

Edward and Cynthia Sanchez were married seventeen years and had four children. Edward an engineer with Motorola, Cynthia a homemaker.

Trial testimony shows that on December 1, 2003 Cynthia had an initial meeting with a divorce attorney (RR;Vol3;279). Later that day she made her first allegations of abuse and murder conspiracies to a friend. When questioned as to why she did not promptly report these serious allegations, Cynthia replied she was planning a divorce and would rather wait for her attorney to prepare her case (RR:Vol3;287,319).

Three months later Cynthia initiated divorce proceedings in a well financed and carefully prepared legal blitz. This included an ex-parte temporary protective order alleging child abuse, spousal cruelty, family violence, murder conspiracies, and more. Ten days later, the hearing on protective orders neatly coincided with the first hearing on divorce temporary orders.

In a small town Texas courtroom, opposing counsel implicitly argued this case as that of a controlling abusive Hispanic husband and a docile Anglo wife. Although a protective order was rejected,

the temporary custody orders were highly damaging to Edward's position as a parent. Cynthia was awarded interim sole managing conservatorship, and Edward ordered supervised visitations until the allegations could be resolved pending a Child Protective Services investigation. An investigation initiated by opposing counsel's newly retained therapist the same morning of this first hearing. The stage was now set.

Cynthia's attorney promptly communicated to Edward that unless he consented to relocation of the children to Mississippi near Cynthia's parents (who financed this venture), they were prepared to move for a jury trial as quickly as possible.

During the following months, Child Protective Services (RR;Vol5:RX4) investigated the family and concluded the evidence did not meet the statutory definitions of abuse or family violence. A thorough court ordered psychological evaluation (CR168-202) made no findings or implications of abuse. The evaluation asserted Cynthia and the children admitted she was guilty of the same parental discipline issues she had raised. It advised against imposing any restrictions against either parent and recommended joint managing conservatorship as in the best interests of the children. After a year of weekly counseling, the children's therapist (retained by Cynthia's attorney just prior to first hearing and who promptly contacted CPS), could not assert abuse

or family violence or offer hearsay from the children to support such.

Although the initial allegations of murder conspiracies was good fodder for supporting an ex-parte protective order and divorce court theatrics, it was never remotely pursued with law enforcement. The record shows the Seguin Courts never made any express findings of abuse or family violence against Edward during 18 months of temporary orders.

Nevertheless, the Seguin court adamantly refused to grant Edward's requests for standard rights of conservatorship and possession. This implicitly to maintain status quo pending trial. The court subsequently refused to comply with Family Code procedural requirements (§153.072, §153.258) to provide requested findings on the reasons for this.

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§153.072 Written Findings Required to Limit Parental Rights and Duties. The court may limit the rights and duties of a parent appointed as a conservator if the court makes a written finding that the limitation is in the best interest of the child.

§153.258 Request for Findings When Order Varies From Standard Order ... in all cases in which possession of a child by a parent is contested and the possession of the child varies from the standard possession order, on written request made or filed with the court not later than 10 days after the date of the hearing or on oral request made in open court during the hearing, the court shall state in the order the specific reasons for the variance from the standard order.

Trial

After 18 months of litigation, a bench trial was conducted. Cynthia was awarded sole managing conservatorship and granted immediate relocation to Mississippi. Edward was granted possessory conservatorship and standard possession/visitation. At a hearing one week later Edward requested the court reconsider changing its ruling from sole to joint managing conservatorship.

The trial court angrily responded with a finding of 'Uncontroverted Evidence of Abuse' in denying this request. This was the first finding of abuse the courts had made during the suit. Beyond opposing counsels courtroom rhetoric at trial, not one single witness, including Cynthia's own testimony, had affirmatively asserted abuse.

It is notable that in over 900 pages of trial transcripts there are 35 references to the term abuse and its derivatives, yet not one substantively or even inferentially asserts abuse. Nevertheless, despite an utter lack of substantive evidence of abuse, and disregarding substantive evidence to the contrary, the trial court made such a finding.
Why? A finding of abuse automatically trumps the Texas Family Code's presumption of joint managing conservatorship. This in turn guaranteed sole managing conservatorship to Cynthia. This then facilitated granting relocation of the children, and

minimized the need to base this determination on a fact intensive best interest analysis.

In a hearing on a motion for new trial, complaints challenging the sufficiency of the evidence and the court ignoring the plain letter of the law were raised. Also raised were constitutional issues. The trial court rejected these arguments without comment.

The requested findings of fact and conclusions of law (p.A25) were prepared by opposing counsel and except for one cross-out filed as-is by the trial court. These findings were challenged as inaccurate and misleading in post judgment motions and on appeal.

B. The Texas Fourth Court of Appeals Decision

The court of appeals unilaterally affirmed the trial court. However, beyond correctly stating the nature of the case, the published Opinion is inaccurate and misleading in light of the errors made in the review. The appeals court failed to adhere to procedural requirements designed to ensure fair and an unbiased hearings. This includes:

1. Refused to properly address a challenge that the trial courts findings are in conflict with the plain letter of the law.
2. Improperly reviewed the legal sufficiency of the evidence by arbitrarily disregarding all controverting evidence, in conflict with its state supreme court directives for legal sufficiency reviews.

The errors induced in this review assured only one logical outcome, which was to affirm the lower court. Such omissions clearly violate due process.

The Opinion of the court of appeals further stated that the constitutional issues raised with respect to a parents fundamental liberty interest are without legal merit, since a custody dispute is nothing more than a private suit between two individuals that does not involve "state action" (p.A17).

REASONS FOR GRANTING THE PETITION

The Fourteenth Amendment of the U.S. Constitution assures parents the right of due process in legal proceedings that implicate the parent-child relationship.

In the Sanchez family case, due process required the courts to adhere to rules of procedure and the plain letter of the law. It required the courts to address properly raised complaints in good faith and in the context required by law. There was no compelling reason for the state to not comply with such fundamentally basic procedural requirements. However, both the trial court and court of appeals fell short on key rules of procedure, to the extent that it violated due process.

This case reflects a growing number of concerns being raised in many forums on what due process of law really means for parents in countless family courtrooms across America. To what extent are courts bound by rules of procedure in rendering decisions that impact the parent-child relationship? To what extent should this Court address parental rights in the context of due process?

Such questions are very much in need of authoritative answers and benchmarking guidance from this Court. Granting Certiorari in this case could very well have a tremendous impact in our nations family courts.

I. Due Process Violations By the Court of Appeals

The legally inadequate finding of abuse is the single most dispositive issue raised, given the trial court rulings are heavily predicated upon this. Absent such a finding, it was argued the result would have a domino effect against the rulings.

Texas rules of appellate procedure expressly require a court of appeals to address all dispositive issues raised on appeal.[1] Given a parent's liberty interest stake in this appeal, good faith compliance with this procedural requirement is essential to ensuring due process is adequately afforded.

Edward argued on appeal the entirety of the evidence the trial court used to make its findings of abuse is nothing more than weakly circumstantial and inferential. Furthermore, none of this evidence can support a finding of abuse in the light of the statutory definitions of abuse.

Cynthia's counsel's response was 'the record is replete' with incidents of abuse, while astutely avoiding directly addressing even one single shred of evidence in the context of a legal analysis.

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1. "The court of appeals must hand down an opinion that is as brief as possible and that addresses every issue raised and necessary to final disposition of the appeal". Texas Rules of Appellate Procedure 47.1.

Although the court of appeals affirmed, its sufficiency of the evidence review was legally inadequate, and it clearly avoided addressing any evidence in the light of the applicable statutes.

ISSUE #1

Inadequate Review of the
Trial Courts Conclusions of Law

Issue #1 raised on appeal asserted and clearly articulated the reasons why the trial court abused its discretion in making legally inadequate findings of abuse. Appellant brief presented an analysis of the evidence against the applicable statutes. In other words, what the trial court stated was abuse was not abuse when the prevailing evidence is viewed in the light of the plain letter and intent of the statutes defining this term.

But other than affirming evidence of abuse, the published opinion offers no indication any such evidence was reviewed against the statutes.

ISSUE #2

Inadequate Review of the
Legal Sufficiency Of The Evidence

In reviewing the legal sufficiency of the evidence (p.A3,A4), the court of appeals applied a traditional standard, citing *Lenz v Lenz*, 79 S.W.3d 10,13 (Tex. 2002). It then proceeded to review a highly disputed divorce-custody suit by considering all evidence presented by one parent and ignoring all evidence

presented by the other parent.

It is very important that the appeals court failed to acknowledge and apply the most recent and overriding precedent of *City of Keller v. Wilson*, 168 S.W.3d (Tex. 2005). In this landmark case, the Texas Supreme Court determined that in reviewing a verdict for legal sufficiency, the reviewing court "must view the evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not." Id at 802,827. "...it is important that when courts use the exclusive standard and disregard contrary evidence, they must recognize certain exceptions to it" Id at 811.

The appeals court disregarded, without comment, all undisputed evidence contrary to the rulings.[2] Evidence from a state agency and a court

2. "...There is no principled reason for a reviewing court to disregard the existence of undisputed factual evidence concerning the circumstances in conducting a legal sufficiency review in cases controlled by the preponderance of the evidence proof standard, even if the evidence by itself or in combination with other evidence would contravene the jury's verdict...Texas appellate courts have conscientiously adhered to standards of legal and factual sufficiency review for many years. Because those standards establish and govern the relationships between judges, juries and reviewing courts, they are of enormous importance to the principled operation of any legal system that pretends to be governed by legal principles rather than a desire to achieve particular results..." *City of Keller* and Standards of Review, Professor William Dorsaneo, 23rd Annual Litigation Update (State Bar of Texas). Jan 18. 2007

appointed psychologist were introduced at trial. Child Protective Services determined the evidence in this case does not meet the statutory definitions of abuse or family violence. A family psychological evaluation conducted by Dr Shelly Probber made no findings or implications whatsoever of abuse. A review of the Opinion offers no indication that this or any other controverting evidence even exists.

In Texas, a legal sufficiency of the evidence review requires due consideration of all evidence. Evidence unfavorable to the verdict is only excluded if reasonable minded jurors could do so.

When all evidence contrary to a verdict is arbitrarily excluded without comment, there is no contextual framework for an observer to understand the nature of the evidence or the basis of the court's legal reasoning. This is inherently misleading, since it can only lead an observer to the conclusion the supporting evidence is undisputed and unequivocally supports the verdict, which in this case is incorrect.

It was argued the record is devoid of any undisputed evidence to support abuse. The entirety of the evidence was weakly circumstantial and inferential. Not one single witness had asserted abuse or family violence during eighteen months of litigation through trial. Undisputed evidence to the contrary came from Child Protective Services and a court appointed licensed psychologist.

Given the weight the of controverting evidence, the preponderance of the evidence standard, the equal inference rule, and the statutes on abuse and family violence, there is no legal basis to sustain any finding of abuse based upon the evidence in the record.

The appeals court improperly extrapolated abuse from meager circumstantial and inferential evidence. "...evidence cannot be taken out of context in a way that makes it seem to support a verdict when in fact it never did". *City of Keller v. Wilson*, 168 S.W.3d, 812 (Tex. 2005).

Given the out-of-context manner in which the appeals court presents its supporting evidence is misleadingly persuasive, this must be briefly addressed here. The entirety of the evidence the appeals court raised to inferentially affirm abuse is presented in table format against the controverting evidence that it ignored (pp.A36-A41). The applicable statutes are also included. These are excerpted from the petition for review to the state supreme court.

SUMMARY

This case raises important questions that only this Court can and should authoritatively answer. In essence, what should Due Process really mean as a practical matter to thousands of parents sitting in family courts every day across America? Beyond abstract and imprecise concepts of procedural due process equating to fundamentally fair hearings, what does this really mean in the context of protecting the fundamental rights of parents?

Given the questions raised and the nature of this case, this petition would be an appropriate vehicle for this Court to enunciate to this nations parents and family courts what procedural due process is. And maybe even more importantly, what procedural due process is not.

Most, if not all, family law attorneys are highly cognizant of the fact that due process problems are much more pervasive in our nations family courts than they should be. Be it improper ex-parte hearings, a battered parent in one courtroom making bona-fide claims of abuse that are improperly minimized, a parent in another courtroom falsely accused of abuse for a custody advantage being denied due process, or parents in hundreds of other courtrooms facing arbitrary and unreasonable rulings on conservatorship, visitation, and support that clearly violate rules of procedure in the Family Code. An unfortunate reality is that most parents,

and their children, have little recourse other than to take due process violations on the chin and move on.

The Fourteenth Amendment's Due Process Clause is abrogated when procedural requirements designed to ensure fairness are ignored or circumvented to the extent that desired results are unfairly achieved. This harms families across our nation in all walks of life and is a societal problem.

Most cases with valid due process issues simply fade away. For many reasons very few cases that should be rightfully appealed are appealed. Far fewer overcome the error preservation requirements and other hurdles on the road to the U.S. Supreme Court. If the extent of due process issues in our nations family courts were gauged by appeals filed and won or brought to this Court, then such issues would be deemed negligible. As most understand, this is far from the truth.

Justice Puryear of the Texas 3rd Court of Appeals in Austin openly acknowledged in great length in a concurring opinion the fundamental liberty interests of parents and that far too many Texas family courts fall short on affording the constitutional protections due parents. *In the Interest of J.R.D. and T.C.D.*, 169 SW3d 740 (Tex.App.Austin, 2005).

On the flip side of the coin, Justice Hilbig of the Texas 4th Court of Appeals reasoned that this Sanchez family divorce-custody dispute is nothing

more than a private suit between two individuals that does not involve "state action" (p.A17). Ergo no infringements of a parents liberty interest.

There are disturbing inconsistencies and incongruities across our nations family courts with respect to parental rights and the application of the due process clause of the Fourteenth Amendment.

It has been eight years since this Court last addressed a parental rights case in *Troxel v. Granville*. Given the deeply rooted family values our nation has embraced for over two hundred years, and given the constitutional interests at stake, it is again time for this Court to address this matter of national importance.

CONCLUSION

This petition for a writ of certiorari should be granted.

APPENDIX A

DECISION OF TEXAS SUPREME COURT DENYING REHEARING

THE SUPREME COURT OF TEXAS

Orders Pronounced February 8, 2008

ORDERS ON MOTIONS FOR REHEARING

THE MOTIONS FOR REHEARING OF THE FOLLOWING PETITIONS FOR REVIEW ARE DENIED:

07-0710 - EDWARD SANCHEZ v. CYNTHIA SANCHEZ; from Guadalupe County; 4th district (04-06-00469-CV, ___ SW3d ___, 07-03-07)

Published online at www.supreme.courts.state.tx.us/Historical/020808.asp

APPENDIX B

DECISION OF THE STATE COURT OF APPEALS

TEXAS FOURTH COURT OF APPEALS

Published at:
www.4thcoa.courts.state.tx.us/opinions/HTMLopinion.asp?OpinionID=20303

MEMORANDUM OPINION

No. 04-06-00469-CV

Edward John SANCHEZ,
Appellant
v.
Cynthia Young SANCHEZ,
Appellee

From the 25th Judicial District Court,
Guadalupe County, Texas

Trial Court No. 04-354-CV
Honorable Linda Z. Jones, Judge Presiding

Opinion by: Steven C. Hilbig, Justice
Sitting: Catherine Stone, Justice
Karen Angelini, Justice
Steven C. Hilbig, Justice
Delivered and Filed: July 3, 2007

AFFIRMED

Edward John Sanchez appeals from a final decree of divorce awarding sole managing conservatorship of the children of the marriage to Cynthia Young Sanchez. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Cynthia filed for divorce and sought sole managing conservatorship of the couple's four minor children. In her petition she alleged Edward committed family violence, including a pattern of physical abuse directed toward the children. She also wanted the right to designate the children's primary residence without a geographic restriction to Texas so that she could move the children to Mississippi. Edward sought joint managing conservatorship and requested the court to impose a geographic restriction to Guadalupe County and contiguous counties.

Following a bench trial, which included interviewing the four children in chambers, the court granted the

divorce and named Cynthia sole managing conservator. The court also imposed a geographic residency restriction for the children to the states of Texas or Mississippi. The trial court found Edward had engaged in a pattern of child neglect as well as physical and emotional abuse directed against Cynthia and the children.

After trial, Edward decided to proceed pro se and filed numerous post judgment motions, all of which were denied. Edward now brings this pro se appeal alleging numerous errors by the trial court.

ISSUES ON APPEAL

Sufficiency of Evidence and Specificity of Findings

In his first four issues it appears Edward is challenging the specificity[1] of the court's findings and contending the court erred in (1) appointing Cynthia sole managing conservator, (2) refusing to impose his requested geographic residency restriction, and (3) rejecting Edward's request for modified summer possession. We review the trial court's rulings on these issues for abuse of discretion.

Petitioners Footnote (Not Part of Opinion)

1. Incorrect. The text of Issue #1 is - Findings and Conclusions - Is the evidence legally and factually insufficient to support the findings based upon a preponderance of the evidence as required by the Family Code? Did the Trial Court err in its Conclusions of Law?

See Gardner v. Gardner, 04-06-00218-CV, 2007 WL 1341186, at *1 (Tex. App.-San Antonio May 9, 2007, no pet. h.); *Grayson v. Grayson*, 103 S.W.3d 559, 561 (Tex. App.-San Antonio 2003, no pet.). "A trial court abuses its discretion if it acts without reference to guiding rules or principles (legal issues), or acts arbitrarily or unreasonably (factual issues)." *Gardner*, 2007 WL 1341186, at *1; *see Naguib v. Naguib*, 137 S.W.3d 367, 371 (Tex. App.-Dallas 2004, pet. denied). When the proper standard of review is abuse of discretion, challenges to the legal and factual sufficiency of the evidence are not independent grounds of error but are merely factors in determining whether the trial court abused its discretion. *Gardner*, 2007 WL 1341186, at *1; *London v. London*, 192 S.W.3d 6, 14 (Tex. App.-Houston [14th Dist.] 2005, pet. denied). In such instances, an appellate court engages in a two-prong analysis to determine (1) whether the trial court had sufficient information upon which to exercise its discretion, and (2) whether the trial court erred in its application of discretion. *Gardner*, 2007 WL 1341186, at *1; *Sotelo v. Gonzales*, 170 S.W.3d 783, 787 (Tex. App.-El Paso 2005, no pet.). In determining whether the trial court had sufficient information, we use the traditional standards of review for legal and factual sufficiency. *Gardner*, 2007 WL 1341186, at *1; *see Lenz v. Lenz*, 79 S.W.3d 10, 13 (Tex. 2002)

(setting forth standard of review for legal sufficiency); *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001) (setting forth standard of review for factual sufficiency).

Edward first contends the trial court erred in appointing Cynthia sole managing conservator. He argues the trial court should have appointed the parties joint managing conservators. In light of the evidence and applicable law, we find no abuse of discretion.

Section 153.131 of the Texas Family Code states:

(a) Subject to the prohibition in Section 153.004, unless the court finds that the appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development, a parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child.

(b) It is a rebuttable presumption that the appointment of the parents of a child as joint managing conservators is in the best interest of the child. A finding of a history of family violence involving the parents of a child removes the presumption under this subsection,

Tex. Fam. Code Ann. ⁋ 153.131 (Vernon 2002). This section of the Family Code requires the trial court to appoint parents as joint managing conservators because it is presumed that such an appointment is in the best interest of the child. *Id.* However, the mandate in favor of joint managing conservatorship is subject to two limitations: (1) section 153.004, which precludes a trial court from appointing joint managing conservators if there is credible evidence of a history or pattern of past or present child neglect or physical or sexual abuse; and (2) section 151.131(b), which removes the best interest presumption if there is a finding of a history of family violence. *Id.* 153.004(b) (Vernon Supp. 2005); 151.131(b).

In this case, though denied and/or its effects minimized by Edward, there was ample evidence of a history of family violence and credible evidence establishing a history or pattern of child neglect and physical abuse toward the children. Edward admitted placing the children in a closet for up to an hour at a time as punishment. There was evidence Edward placed one of the children in the closet and she remained there, despite having urinated on herself, until Cynthia returned from an errand and heard her crying. According to Cynthia, the same child was placed in the dark closet completely naked on two separate occasions. Cynthia testified Edward

backhanded another of the children, knocking him seven to eight feet, because he was dancing around the kitchen when he was supposed to be cleaning. Cynthia testified that incident was not the first time Edward had knocked this child to the ground. Edward admitted striking the child's forehead with his hand causing the child to travel five to six feet. There was also evidence Edward once found crumbs on a table in the living room and flew into a rage, knocking over furniture and yelling at the children. Cynthia's mother testified Edward often flew into rages directed at Cynthia or the children. The oldest child's teacher testified that when the child received a "B" in math, she was so scared to go home and tell Edward that she became physically ill. Cynthia testified that Edward would yell at the child until she cried if she made anything other than an "A." All of the children admitted to their counselor that they were afraid of Edward, though the feeling began to dissipate after the separation. A neighbor, a former San Antonio police officer, testified he believed the children were afraid of Edward based upon his observation of the family and the way the children responded to Edward. There was evidence Edward took most of the children's toys away and ultimately discarded them. He also threw away the trophies each child had earned in karate class. Finally, there was evidence that while Edward was undertaking

major home renovations, he refused to remove carpet tacks from the house even after one child had stepped on the tacks more than once. According to Cynthia, Edward's response to her request to remove the tacks was "He'll learn."

The trial court was the fact finder in this case and was the sole judge of the credibility of the witnesses and the weight to be given their testimony. *See City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005). After reviewing the record, we conclude the trial court had sufficient information to exercise its discretion and did not abuse that discretion in appointing Cynthia sole managing conservator. *See Gardner*, 2007 WL 1341186, at *1 (using two-pronged inquiry for sufficiency challenged when abuse of discretion standard applies); *see also In re Gonzalez*, 993 S.W.2d 147, 155 (Tex. App.-San Antonio 1999, no pet.) (holding abuse of discretion does not occur as long as some evidence of substantive and probative character exists to support trial court's decision).

Edward next complains of the trial court's refusal to impose a geographic restriction limiting residency of Cynthia and the children to Guadalupe County and contiguous counties. Instead of imposing the restriction requested by Edward, the trial court imposed a restriction limiting residency to either

Texas or Mississippi. Edward contends this was not in the best interest of the children.

The trial court appointed Cynthia sole managing conservator. One of the rights bestowed upon a sole managing conservator is the exclusive right to determine primary residence of the child. Tex. Fam. Code Ann. ¶ 153.132(1) (Vernon Supp. 2006). Any residency restriction imposed on this right is within the trial court's discretion based on the best interest of the child. *See id.* ¶ 153.002 (Vernon 2002) (stating that best interest of child shall always be primary consideration of court in determining issues of conservatorship, possession, and access). Thus, the question is whether the trial court had sufficient information to determine whether a residency restriction within the states of Texas and Mississippi was in the best interest of the children and whether it abused its discretion in making that determination. *See Gardner*, 2007 WL 1341186, at *1 (using two-pronged inquiry for sufficiency challenge when abuse of discretion standard applies).

The trial judge heard evidence that Edward had circulated a letter containing unflattering personal information about Cynthia and her family to multiple recipients throughout the community. The letter was sent against the advice of Edward's counsel and his therapist. Cynthia testified she

believed that if she and the children were forced to remain in Guadalupe County Edward would send similar letters to any new people with whom she might establish a relationship. The trial court found the letter was designed to "annoy, alarm, harass, embarrass, and shame" Cynthia and make it difficult for her to remain in Guadalupe County or any of the surrounding counties. There was also evidence that Edward had isolated Cynthia while they lived in Guadalupe County so she has no support system there.

Cynthia presented testimony that she and the children would have a fresh start in Mississippi with a support system of friends and family. Cynthia's parents purchased a home for Cynthia and the children in Meridian, Mississippi, which is less than an hour away from the parents' home. Cynthia testified she had toured the school in Mississippi that the children would attend and had talked to counselors about programs for one of the children who has been diagnosed with Asperger's Syndrome-a mild form of autism. She stated the school has after-school care programs that would allow Cynthia to continue her education. She said she has many family members living within an hour or so of Meridian, including her parents and a sister, and that she has cousins living one street over from the house purchased by her parents. She has also met

her neighbors and they have two children the same ages as two of her children and have expressed a willingness to assist her as needed. Finally, there was testimony from the children's counselor in which he opined that the children "would be safest in Mississippi."

Though there was evidence showing potential problems with a move to Mississippi and benefits to the children in remaining in Guadalupe County, we hold the trial court had sufficient information to exercise its discretion and did not abuse that discretion in refusing to impose a geographic restriction limiting residency to Guadalupe County and/or contiguous counties.

Edward next complains the trial court erred in refusing to accept his "modified summer possession" plan. In the final decree, the trial court essentially imposed standard summer possession as set forth in the Family Code. *See* Tex. Fam. Code Ann. 153.312-313 (Vernon 2002 & Vernon Supp. 2006). Given that the parties reside more than 100 miles apart, this entitled Edward to possession of all four children for forty-two days in the summer. *See id.* ? 153.313(3). Edward, however, wanted a modified summer plan whereby he would be awarded possession as follows: (1) twenty-one days with two children; (2) fourteen

days with all four children; and (3) twenty-one days with the other two children. Edward claimed this would allow him to give each child the individual attention he or she needed.

Section 153.251(c) of the Family Code states, "It is preferable for all children in a family to be together during periods of possession." *Id.* 153.251(c). Joseph Aguilera, the children's counselor, opined that the children should remain together during Edward's periods of access. He stated the children were "a unit" and they felt "more secure together."

In support of his request, Edward points to the report of Dr. Shelley Probber, the court-appointed psychologist asked to evaluate the parents and the children. Edward contends that in her report Dr. Probber had no objection to Edward's plan to take the children two at a time. However, Dr. Probber never testified during the trial and Edward failed to introduce her report. Nevertheless, even if we assume Dr. Probber approved Edward's plan and believed it was in the best interest of the children, this would conflict with the direct testimony of Aguilera, the children's counselor. As previously stated, the trial court was the fact finder and was the sole judge of the credibility of the witnesses and the weight to be given their testimony. *See City of Keller*, 168 S.W.3d at 819. Thus, the court was

entitled to accept Aguilera's testimony and reject that of Dr. Probber. Accordingly, we conclude the trial court had sufficient information to exercise its discretion and did not abuse that discretion in imposing standard visitation and refusing to split the children during Edward's periods of possession.

Finally, with regard to the court's findings relating to the issues discussed above, Edward appears to complain that the court's findings are not sufficiently specific. Edward timely requested additional and amended findings, thereby preserving his complaint for appeal. *See McDuffie v. Blasingame*, 883 S.W.2d 329, 337 (Tex. App.-Amarillo 1994, writ denied) (holding that when party fails to timely request additional or amended findings within ten days after trial court files original findings, requesting party waives right to complain on appeal that findings were not full and complete, or that court failed to enter additional findings of fact). However, a trial court is only required to file additional or amended findings and conclusions that are appropriate. Tex. R.Civ.P.298. Moreover, additional or amended findings are not required if the original findings "'properly and succinctly relate the ultimate findings of fact and law necessary to apprise [the party] of adequate information for the preparation of [the party's] appeal.'" *Main Place Custom Homes, Inc. v. Honaker*, 192 S.W.3d 604, 612 (Tex. App.-Fort Worth

2006, pet. denied) (quoting *Balderama v. W. Cas. Life Ins. Co.*, 794 S.W.2d 84, 89 (Tex. App.-San Antonio 1990), *rev'd on other grounds*, 825 S.W.2d 432 (Tex. 1991)). We have reviewed the additional and amended findings requested by Edward and find they were neither appropriate nor were they necessary to permit Edward to adequately prosecute his appeal.

Based upon the foregoing, we reject Edward's complaints with regard to legal and factual sufficiency as well as his complaint regarding the lack of specificity in the trial court's findings. Accordingly, we overrule issues one through four.

Injunction

In the final decree, the trial court entered a permanent injunction prohibiting both Edward and Cynthia from placing a child in a closet or using excessive corporal punishment as methods of discipline. Edward complains in his fifth issue that the trial court granted this relief in violation of Rule 301 of the Texas Rules of Civil Procedure because there was no pleading to support it. *See* Tex. R. Civ. P. 301 (stating that judgment of court shall conform to pleadings, nature of case proved, any verdict, and be framed so as to give party all relief to which he is entitled).

A trial court may not grant relief in the absence of pleadings supporting such relief. *Holmstrom v. Lee,* 26 S.W.3d 526, 532 (Tex. App.-Austin 2000, no pet.); *see* Tex. R. Civ. P. 301. While a request for general relief cannot enlarge a pleading to include a different cause of action for which fair notice does not exist, *Stoner v. Thompson*, 578 S.W.2d 679, 683 (Tex. 1979), relief consistent with a petitioner's theory as reflected in the petition may be granted under a general prayer for relief. *Kissman v. Bendix Home Systems, Inc.*, 587 S.W.2d 675, 677 (Tex. 1979). We have reviewed the pleadings filed by both Edward and Cynthia and both requested general relief. Moreover, Cynthia specifically alleged Edward engaged in a pattern of physical abuse directed toward the children and asked within the petition that the court render an order "designed to protect the safety and well-being of the children." As shown in our discussion of issues one through four, there was sufficient evidence to support the finding of family violence and that Edward had placed the children in a closet and used corporal punishment. Thus, we conclude the prayer for general relief, the allegations and requests within the petition, and the evidence presented authorized the trial court to order the permanent injunction. The injunction was consistent with Cynthia's claims and the petition

gave fair notice of the relief sought. We overrule issue five.

> In issue six, Edward raises what he deems "constitutional issues." He first contends "the state" has infringed upon his "fundamental liberty interest" with regard to his right to custody and care of his children without a compelling state interest. Edward appears to assume this case involves state action because it was presided over by a state district judge. There is no legal support for Edward's presumption and his argument is wholly without merit. There has been no "state action" in this case; rather, this was a private suit between two individuals concerning issues of divorce and child custody.

Edward next argues he received ineffective assistance of counsel from his "board certified and experienced family law attorney's [sic]." It is well established that the right to effective assistance of counsel does not extend to purely civil cases. *See, e.g.*, *Green v. Kaposta*, 152 S.W.3d 839, 844 (Tex. App.-Dalias 2005, no pet.); *Cherqui v. Westheimer St. Festival Corp.*, 116 S.W.3d 337, 343 (Tex. App.-Houston [14th Dist.] 2003, no pet.). Therefore, Edward's complaint is without merit.

Lastly, Edward argues that in suits affecting the parent-child relationship the use of the preponderance of the evidence standard, rather than

the clear and convincing standard, is a violation of his due process rights under the 14th Amendment of the United States Constitution. He contends that because he has a "fundamental liberty interest" in the care and custody of his children, the constitution mandates use of a higher standard of proof on issues of conservatorship and residency restrictions.

Section 105.005 of the Family Code states that unless otherwise provided, all court findings shall be based on a preponderance of the evidence. Tex. Fam. Code Ann. ⁋ 105.005(Vernon 2002). This standard of proof does not violate the 14th Amendment because decis.ons relating to issues of conservatorship, possession, and support are revocable and subject to relitigation. *See Choyce v. Dallas County Child Welfare Unit*, 642 S.W.2d 559, 561 (Tex. App.-Dallas 1982, no writ). In other words, decrees involving issues under Chapter 153 and 154 of the Family Code "may be modified or changed from time to time, but the parent still retains some rights in and control over a child."[2] *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976). Thus, there is not such a serious loss of rights so as to require a stricter burden of proof than that set forth in section 105.005. *Choyce*, 642 S.W.2d at 561.

Based on the foregoing, we find no constitutional error. Accordingly, we overrule Edward's sixth issue.

Miscellaneous Issues

Within his seventh issue, Edward raises no less than eleven alleged errors-none of which are related.[3] As to issues "7B2," "7B3," "7B4," 7B5," "7C1," "7C3," and "7C4" Edward has not complied with the applicable briefing rules.[4] *See* Tex. R. App. P. 38.1. In each of these issues Edward has failed to provide citation to authority and has not included any argument. *See* Tex. R. App. P. 38.1(h) (stating that brief must contain clear and concise argument for contentions made with appropriate citations to authorities and the record). Rather, Edward has merely stated his complaint and referred this court to pleadings filed in the trial court, which he has attached as part of the appendix to his brief. This type of "briefing" (briefing by mere reference to trial court documents) is not recognized by the Texas Rules of Appellate Procedure and we decline to approve such a technique.[5] Accordingly, we hold Edward has waived these issues. *See In re B.L.*, No. 04-05-00621-CV, 2006 WL 1895450, at *5 (Tex. App.-San Antonio Jul. 12, 2006, pet. denied (mem. op.) (citing *Fredonia State Bank v. Gen. Am. Life Ins. Co.*, 881 S.W.2d 279, 284-85 (Tex. 1994) (holding appellate court has discretion to deem points of error waived due to inadequate briefing)).

In issues "7A1" and "7A2," Edward complains about certain pretrial orders entered in this case and a failure to file findings of fact based on one of those orders. Obviously a final judgment has now been entered in this matter. Thus, any pretrial orders have expired or been subsumed within the final judgment. Thus, any complaint about such orders is moot. We overrule these issues.

Edward next complains he was denied his right to trial by jury. He argues that off-the-record negotiations took place regarding a jury trial and the trial court ultimately exerted improper influence to ensure a bench trial was held. At a hearing held prior to trial, Edward specifically waived his right to trial by jury:

THE COURT: . . . On the record, everybody's waiving their jury trial; is that correct?
MR. BRAZLE [counsel for Edward]: Mr. Sanchez?
MR. SANCHEZ: Yes. (italics in original). Thus, Edward's contention is without merit and issue "7B1" is overruled.
The next complaint is that the trial court erred in denying his post judgment motions to modify and motion for new trial. We have reviewed the motions and find no abuse of discretion by the trial court. In fact, the motions in essence challenge the trial court's findings on conservatorship and residency

and we have already reviewed these contentions in this appeal and found them to be without merit. Accordingly, we overrule issue "7C2." *Fundamental Error*

In his final issue, Edward appears to argue we should reverse this case because Cynthia's attorney acted unethically. In essence, this last issue is nothing more than a rant against opposing counsel, Cynthia, and the ultimate outcome. This presents nothing for our review and we overrule issue eight.

Reply Brief

In his reply brief, Edward attempts to raise an entirely new issue, issue nine. Rule 38.3 of the Texas Rules of Appellate Procedure permits an appellant to file a reply brief "addressing any matter in the appellee's brief." Tex. R. App. P. 38.3. By its terms, the rule does not permit an appellant to raise entirely new issues in a reply brief. Accordingly, we decline to review this additional issue.

Rule 45 Sanctions

Finally, Cynthia requests we award damages against Edward for pursuing a frivolous appeal. *See* Tex. R. App. P. 45. Rule 45 provides as follows:

If the court of appeals determines that an appeal is frivolous it may-on motion of any party or on its own initiative, after notice and a reasonable opportunity

for response-award each prevailing party just damages. In determining whether to award damages, the court must not consider any matter that does not appear in the records, briefs, or other papers filed in the court of appeals.

Id. It is within our discretion to grant or deny appellate sanctions. *Tabrizi v. Das-Rez Corp.*, No. 04-05-00945-CV, 2007 WL 671323, at *4 (Tex. App.-San Antonio Mar. 7, 2007, no pet.) (mem. op.). Our discretion must be exercised "with prudence, caution, and after careful deliberation." *Id.* (quoting *Baker Hughes Oilfield Operations, Inc. v. Hennig Prod. Co., Inc.*, 164 S.W.3d 438, 448 (Tex. App.-Houston [14th Dist.] 2005, no pet.)). While we have determined that Edward's appellate complaints are without merit, we decline to impose sanctions. Thus, we deny Cynthia's request for appellate sanctions.

CONCLUSION

Based upon our analysis of the complaints raised by Edward, we find no error by the trial court. Accordingly, we overrule all of Edward's issues and affirm the trial court's judgment. Steven C. Hilbig, Justice

1. At the time of trial in September of 2005, the children were ages 13, 11, 9, and 7.

2. This is in contrast to parental termination cases, which do require proof by clear and convincing evidence. As recognized by the supreme court, parental termination cases involve decisions that are "complete, final, irrevocable." *Wiley*, 543 S.W.2d at 352. Such decisions divest a parent of all legal rights, duties, and powers with respect to the children. *Id.* This justifies a higher burden of proof. *Id.*

3. An issue or point of error addressing more than one specific ground of error is multifarious. *Shull v. United Parcel Serv.*, 4 S.W.3d 46, 51 (Tex. App.-San Antonio 1999, pet. denied), *cert. denied*, 531 U.S. 835 (2000). If an appellate court determines that an issue or point of error is multifarious, it may refuse to review it or it may consider the point of error if it can determine, with reasonable certainty, the error about which complaint is made. *Id.* In the interest of justice, we will address Edward's complaints-at least those that have been properly briefed. *See id.*

4. Pro se litigants are held to the same standards as licensed attorneys and must comply with all applicable rules of procedure. *Sweed v. City of El Paso,* 195 S.W.3d 784, 786 (Tex. App.-El Paso 2006, no pet.); *Strange v. Continental Cas. Co.*, 126 S.W.3d 676, 677 (Tex. App.-Dallas 2004, pet. denied), *cert. denied,* 543 U.S. 1076 (2005). A pro se litigant is required to properly present his case on appeal.

Strange, 126 S.W.3d at 678. If this were not the rule, pro se litigants would be given an unfair advantage over parties represented by counsel. *Greenstreet v. Heiskell,* 940 S.W.2d 831, 835 (Tex. App.-Amarillo 1997, no writ). We cannot hold pro se litigants and those represented by counsel to difference standards. *See Foster v. Williams,* 74 S.W.3d 200, 202 (Tex. App.-Texarkana 2002, pet. denied).

5. In *Truncellito v. Truncellito*, the appellant presented no argument, authority, or standard of review in his fifth point of error. No. 01-99-00480-CV, 2000 WL 424431, at *1 (Tex. App.-Houston [1st Dist.] Apr. 20, 2000, pet. denied) (not designated for publication). Rather, just as Edward has done here, the appellant referred the appellate court to pages in the clerk's record. *Id.* The court of appeals held the point of error was waived for lack of briefing. *Id.*

APPENDIX C

JUDGMENT OF THE STATE TRIAL COURT

For brevity, only the relevant information and the part of the judgment raised on appeal and brought forth to the Texas Supreme Court are included here.

NO. 04-0354-CV

IN THE MATTER OF	§ IN THE
DISTRICT COURT	§
THE MARRIAGE OF	§
	§
CYNTHIA SANCHEZ	§ 25TH
JUDICIAL	
AND	§ DISTRICT
EDWARD JOHN SANCHEZ	§ COURT
	§
AND IN THE INTEREST OF	§
ERICA NICOLE SANCHEZ, DAVID	§
ALEXANDER SANCHEZ, HEATHER	§
GUADALUPE	
MARIE SANCHEZ AND MICHELLE	§ COUNTY
ELLEN SANCHEZ, CHILDREN	§ TEXAS

FINAL DECREE OF DIVORCE

On September 29, 2005 the Court heard this case

Appearances

Petitioner. CYNTHIA SANCHEZ, appeared in person and through attorney of record, PATRICIA A. FINCH, and announced ready for trial.

Respondent EDWARD JOHN SANCHEZ, appeared in person and through attorney of record. HEATHER C. HOLLUB, and announced ready for trial.

Record

The record of testimony was duly reported by the court reporter for the 25th Judicial District Court.

Jurisdiction and Domicile

The Court finds that the pleadings of Petitioner are in due form and contain all the allegations. information, and prerequisites required by law. The Court, after receiving evidence, finds that it has jurisdiction of this case and of all the parties and that at least sixty days have elapsed since the date the suit was filed. The Court finds that, at the time this suit was filed, Petitioner had been a domiciliary of Texas for the preceding six-month period and a resident of the county in which this suit was filed for the preceding ninety-day period. All persons entitled to citation were properly cited.

Jury

A jury was waived, and questions of fact and of law were submitted to the Court

Divorce

IT IS ORDERED AND DECREED that CYNTHIA SANCHEZ, Petitioner, and EDWARD JOHN SANCHEZ, Respondent, are divorced and that the marriage between them is dissolved on the ground of insupportability.

PAGES 2-3 OF DECREE

Conservatorship

The Court. having considered the circumstances of the parents and the children, finds that the following orders are in the best interests of the children.

The Court finds, after taking into consideration the facts set forth under Article 153.134 in till Texas Family Code. that it is not in the best interest of the children for the parents to be appointed Joint managing conservators. The Court further finds that pursuant to Article 153.134 of the Texas Family Code that the Court may not appoint the parents joint managing conservators where it finds evidence of child neglect or abuse. The Court Finds uncontroverted evidence that neglect or abuse occurred on the part of Edward John Sanchez.

IT IS ORDERED that CYNTHIA SANCHEZ is appointed Sole Managing Conservator and

EDWARD JOHN SANCHEZ is appointed Possessory Conservator of the following children: ERICA NICOLE SANCHEZ, DAVID ALEXANDER SANCHEZ, HEATHER MARIE SANCHEZ and MICHELLE ELLEN SANCHEZ.

PAGE 5 OF DECREE

It is ORDERED that CYNTHIA SANCHEZ, as parent sole managing conservator, shall have the following exclusive rights and duty:

1. the right to designate the primary residence of the children, restricted to Mississippi and Texas.

PAGE 29 OF DECREE

Relief Not Granted

It is ORDRED AND DECREED that all relief requested in this case and not expressly granted is denied. This is a final judgment, for which let execution and all writs and processes necessary to enforce this judgment issue. This judgment finally disposes of all claims and parties and is appealable.

Date of Judgment

This divorce was judicially pronounced and the orders rendered on the 29th day of September, 2005 but the decree of divorce was ministerially executed on 20 day of April 2006.

NO. 04-0354-CV

IN THE MATTER OF COURT	§ IN THE DISTRICT §25TH JUDICIAL
THE MARRIAGE OF	§ DISTRICT § COURT
CYNTHIA SANCHEZ	§ GUADALUPE
AND	§ COUNTY
EDWARD JOHN SANCHEZ	§ TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In response to the request of Respondent, EDWARD JOHN SANCHEZ, the Court makes and files the following as original Findings of Fact and Conclusions of Law in accordance with rules 296 and 297 of the Texas Rules of Civil Procedure and sections 6.711, 153.258, and 154.130 of the Texas Family Code.

Findings of Fact - Divorce

1. CYNTHIA SANCHEZ, Petitioner, and EDWARD JOHN SANCHEZ, Respondent, were married on April 25, 1984.
2. At the time of the filing of this suit. CYNTHIA SANCHEZ had been a domiciliary of Texas for six

months and a resident of GUADALUPE County for ninety days.

3. The marriage of Petitioner and Respondent has become insupportable because of discord or conflict of personalities that destroys the legitimate ends of the marital relationship and prevents any reasonable expectation of reconciliation.

Findings of Fact - SAPCR

4. At the time of the pending divorce proceeding, Petitioner and Respondent were the parents of the following children under the age of eighteen years: (NAMES OF 4 CHILDREN OMITTED)

Findings of Fact - Sole Managing Conservatorship

5. The Court finds that there was substantial and convincing evidence of neglect or abuse on the part of Edward John Sanchez both physically and emotionally. The Court further finds that the record reflected that there were incidences of abuse and/or neglect that were directed at more than one child ~~and included the wife, Cynthia Sanchez~~, and that these incidences of abuse or neglect were cumulative and solidified by the final instance of the eight year old child being put in the closet by Mr. Sanchez and left there until

she urinated on the floor. The Court finds that credible evidence was presented regarding abuse and neglect on the part of Mr. Sanchez amounting to a history of pattern of past or present child neglect and/or physical abuse by one parent directed against the other parent/spouse and children. The Court finds that there was credible evidence presented to determine that the physical, psychological or emotional needs and development of the children would not benefit from the appointment of these two parents as joint managing conservators. The Court further finds that credible evidence was presented to corroborate that the father of these children was unable to give first priority to the welfare of the children and reach shared decisions with the mother in the children's best interest. The Court finds that the father violated the temporary injunction in several ways but, by way of example, by mortgaging the mother's vehicle which she had paid off during the pendency of temporary orders and taking additional action which amounted to severe emotional abuse by mailing a letter which was vicious and defamatory to multiple recipients throughout the community and which was mailed against the advice of his attorneys and counselor. The Court finds that this letter was designed to

annoy, alarm, harass, embarrass and shame his wife and the mother of his children making it difficult for her to remain in Guadalupe County, Texas. The Court finds that it heard evidence of Edward Sanchez's continuing therapy and anger management progress during temporary orders which helped it to determine that the appointment of Edward Sanchez as Possessory Conservator would not endanger the physical or emotional welfare of the children.

Findings of Fact - Geographic Restriction to the States of Mississippi and Texas

6. The Court finds that credible evidence was presented to convince the court that the mother of the child should be allowed to designate the primary residence of the children in either Mississippi where the mother has family or Texas where the father remains located. The Court finds that the father violated the temporary injunction in several ways but, by way of example, by mortgaging the mother's vehicle which she had paid off during the pendency of temporary orders and taking additional action which amounted to severe emotional abuse by mailing a letter which was vicious and defamatory to multiple recipients throughout the community and which was mailed against the

advice of his attorneys and counselor. The Court finds that this letter was designed to annoy, alarm, harass, embarrass and shame his wife and the mother of his children making it difficult to remain in Guadalupe County, Texas.

Findings of Fact and Conclusions flaw

7. Any finding of fact that is a conclusion of law shall be deemed a conclusion of law.

Conclusions flaw - Divorce

1. The Original Petition for Divorce filed by CYNTHIA SANCHEZ and the counterclaim for divorce filed by EDWARD JOHN SANCHEZ are in due form and contain all the allegations required by law.
2. This Court has jurisdiction of the parties, of the children, and of the subject matter of this case.
3. All legal prerequisites to granting a divorce have been met.
4. The divorce is granted on the ground of insupportability.

Conclusions Of Law - Sole Managing Conservatorship

5. After consideration of all of the relevant factors in Article 153.134 of the Texas Family Code and other relevant factors, the Court finds that it is not in the children's best interest for the parties to be appointed Joint Managing Conservators and that the best interest of the children is served by appointing Cynthia Sanchez as Sole Managing Conservator with exclusive rights, privileges, duties and powers enumerated in Article 153.132 of the Texas Family Code and Edward Sanchez as Possessory Conservator under Article 152.191 of the Texas Family Code of the minor children with those rights, privileges, duties and powers.

Conclusions of Law - Determination of the exclusive right to establish legal domicile in Mississippi and/or Texas

6. That is in the children's best interest that Cynthia Sanchez be the conservator who has the exclusive right to designate the primary residence of the children and that the right be restricted to Mississippi and Texas.

SIGNED on 6 - 20 , 2006.

Judge Linda Z Jones, Presiding

APPENDIX E

EXCERPT OF PETITION FOR REVIEW TO TEXAS SUPREME COURT

§71.004(1) Family Violence ...

(1) an act by a member of a family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or a threat that reasonably places the person in fear of imminent physical harm...

(2) abuse, as that term is defined by Sections 261.001(1)(C), (E), and (G), by a member of a family or household toward a child of the family or household

§261.001(1) Abuse Defined ...

(A) mental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning...

(B) causing or permitting the child to be in a situation in which the child sustains a mental or emotional injury that results in an observable and material impairment in the child's growth, development, or psychological functioning;

(C) physical injury that results in substantial harm to the child... excluding an accident or reasonable discipline by a parent... that does not expose the child to a substantial risk of harm...

Evidence from Court of Appeal's Opinion affirming uncontroverted evidence of abuse	Controverting Evidence Disregarded
(1) Edward admitted placing the children in a closet for up to an hour at a time as punishment.	(1) Misstated (CR300) (RR:Vol4,p79). The plural 'children' is incorrect. The only incident in an open foyer closet in which it was close to an hour child was tired and had fallen asleep.
(2) There was evidence Edward placed one of the children in the closet and she remained there, despite having urinated on herself, until Cynthia returned from an errand and heard her crying. According to Cynthia, the same child was placed in the dark closet completely naked on two separate occasions.	(2) Argued as grossly misstated (RR:Vol4,p9) (CR300). Allegations reviewed by CPS and court appointed psychologist, who interviewed parents, children, collaterals, and neither found abuse. This unsupported allegation was never told to CPS, psychologist, or therapist and first raised 18 months later at trial (RR:Vol2,p162). Cynthia and the children had admitted her also using closet as discipline during Psych Eval. Dr Probber asserted this in the report and on the witness stand (RR:Mar10,2005,p76)

Evidence from Court of Appeal's Opinion affirming uncontroverted evidence of abuse	Controverting Evidence Disregarded
(3) Cynthia testified Edward backhanded another of the children, knocking him seven to eight feet, because he was dancing around the kitchen when he was supposed to be cleaning.	(3) Cynthia was admittedly in other room out of sight and Edward argued this as misstated. (RR;Vol1,p62). Reviewed by CPS and court appointed psychologist who made no findings of abuse or family violence in this matter,
Cynthia testified that incident was not the first time Edward had knocked this child to the ground.	Cynthia never articulated any specifics on this allegation.
Edward admitted striking the child's forehead with his hand causing the child to travel five to six feet.	This is the very same incident as above. Edward admitted shoving with the palm of his hand, at which point he stumbled a few steps backward (RR:Vol4,p9).

Evidence from Court of Appeal's Opinion affirming uncontroverted evidence of abuse	**Controverting Evidence Disregarded**
(4) There was also evidence Edward once found crumbs on a table in the living room and flew into a rage, knocking over furniture and yelling at the children.	**(4)** This unsupported allegation, made in Cynthia's affidavit for ex Parte kick-out order, was highly controverted as misstated at the first hearing.
(5) Cynthia's mother testified Edward often flew into rages directed at Cynthia or the children.	**(5)** On cross she was unable to articulate any specific instance of rage, and conceded the rage directed at Cynthia was *"..just loud speech, you know, scolding her for little reason"* (RR:Vol3;61,88)
(6) The oldest child's teacher testified that when the child received a "B" in math, she was so scared to go home and tell Edward that she became physically ill. Cynthia testified that Edward would yell at the child until she cried if she made anything other than an "A."	**(6)** This issue is disputed in unchallenged affidavit in MNT. Child misinterprets parental expectations as parent struggles to find proper balances for children. This was disputed as untrue.

Evidence from Court of Appeal's Opinion affirming uncontroverted evidence of abuse	**Controverting Evidence Disregarded**
(7) All of the children admitted to their counselor that they were afraid of Edward, though the feeling began to dissipate after the separation.	(7) Hired by opposing counsel at onset of suit, yet at trial 18 months later he never asserted abuse. Dr Shelly Probber put his statement in perspective (disciplinarian vs. easy parent) in her psychological evaluation report (CR168)
(8) A neighbor, a former San Antonio police officer, testified he believed the children were afraid of Edward based upon his observation of the family and the way the children responded to Edward.	(8) The only thing this backyard neighbor ever witnessed was Edward once yelling at his children to go inside the house. On cross he admitted this was while children were running around an operating lawn mower, and Edward could have presumably been yelling over the sound of a lawn mower as the result of a safety concern for his children. (RR:Vol2,p19) His testimony was directly contradicted by across the street neighbor (attorney James Kuvet) who stated kids were playful around their father. (RR:Vol3,p303)

Evidence from Court of Appeal's Opinion affirming uncontroverted evidence of abuse	**Controverting Evidence Disregarded**
(9) There was evidence Edward took most of the children's toys away and ultimately discarded them. He also threw away the trophies each child had earned in karate class	**(9)** Controverted that only older unused-damaged toys were discarded given large accumulation from four children. Edward had also discarded his own karate trophies as some trophies broken over time also accumulated. (RR:Vol1,p64)
(10) Finally, there was evidence that while Edward was undertaking major home renovations, he refused to remove carpet tacks from the house even after one child had stepped on the tacks more than once. According to Cynthia, Edward's response to her request to remove the tacks was "He'll learn."	**(10)** Controverted as misstated. Stair project took longer than expected. Cynthia acknowledged on the record that Edward had in fact removed the carpet tack strips. (RR:Vol1;118) This is not Cynthia's testimony, but a direct question opposing counsel asked Edward on cross that was denied. (RR:Vol1;66)